

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
ALUMINUM RECYCLING CORPORATION,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 85-68

AMENDED FINAL FINDINGS
OF FACT, CONCLUSIONS OF
LAW AND ORDER

This matter, the appeal of an order imposing a \$10,000 civil penalty for failure to complete terms of a 1983 regulatory order, came on for formal hearing before the Pollution Control Hearings Board; Lawrence J. Faulk, Wick Dufford, and Gayle Rothrock (presiding) at Spokane, Washington, on July 30, 1985, and at Lacey, Washington, on August 6, 1985. Ken Wittstock of Spokane and Donna K. Woods of Tacoma officially reported the proceedings. A visit was made of the Veradale, Washington ARC site.

Appellant company was represented by its president, Jack Lyon.

Respondent Washington State Department of Ecology was represented by Charles K. Douthwaite, Assistant Attorney General.

Witnesses were sworn and testified. Exhibits were admitted and examined. Argument was heard. From the testimony, evidence, and contentions of the parties, the Board makes these

FINDINGS OF FACT

I

Aluminum Recycling Corporation (ARC) operated a secondary aluminum smelter which recycled beverage cans and aluminum furnace skimmings into aluminum ingots at a leased site near the rolling mill of Kaiser Aluminum Corporation near Veradale on Sullivan Road. ARC's smelter commenced operation there during mid-1982 and closed down in September, 1984, at least in part due to an economic downturn in domestic aluminum markets, a downturn which persists.

II

In November 1982 the vice president of ARC contacted WDOE's Eastern Regional Office to discuss a plan to reprocess black dross, dark grey-to-black tailings from the smelting process. In December a WDOE official requested that all leachable material, including black dross, be stored in a manner that prevents soluble salts from entering the soil and groundwater. Reports on the typical content of black dross indicate it contains approximately 50 percent salts, including sodium chloride and potassium chloride. Some pure aluminum and aluminum oxides are also in dross.

1 III

2 In February 1983, the same WDOE official, who evaluates and
3 monitors hazardous waste storage and disposal practices of many
4 companies in northeastern Washington, wrote ARC informing them that
5 ARC's black dross because of its salt content is a dangerous waste on
6 the basis of a formula provided under WDOE regulations. Such types of
7 regulation-referenced categorizations are called in the vernacular,
8 "book designation."

9 WDOE regulations are based on concentrations of suspect
10 constituents of by-products or compounds. Percentage and weight
11 figure into the calculations. U. S. Environmental Protection Agency
12 and U. S. Occupational Health and Safety Administration source
13 documents are consulted. Arc's black dross was identified as a
14 dangerous waste, in toxicity category D.

15 IV

16 In the summer of 1983 samples of ARC black dross were collected
17 for the purposes of a fish bioassay. Some were denominated "aged
18 black dross," other "fresh black dross." In the fall WDOE reported
19 the results. There were no mortalities of fish from exposure to "aged
20 black dross" in water. Fish mortality was 100 percent at 1,000 ppm of
21 "fresh black dross" in water. There was no evidence explaining the
22 difference between "aged" and "fresh" black dross.

23 WDOE's position is that the fish bioassay, whatever it may mean,
24 does not render its "book designation" of the ARC black dross as
25 dangerous incorrect. The "book designation" result stems from oral

26 AMENDED FINAL FINDINGS
27 OF FACT, CONCLUSIONS
OF LAW & ORDER
PCHB No. 85-68

1 rat bioassay work done with chemical constituents and concentrations
2 like those found in the ARC black dross.

3 V

4 Early on, in the course of interacting with regulatory
5 authorities, ARC discovered that being in the modern recycling
6 business was not enough to set aside compliance with each of the
7 environmental laws of the state. The corporation's then vice
8 president filed a "Notification of Dangerous Waste Activities" form
9 with WDOE in December of 1982 indicating ARC was a generator, treater,
10 and storer of salty dangerous waste. Numerous discussions followed.

11 VI

12 WDOE was apparently under the impression ARC agreed in February
13 1983 to a program of covering dross stockpiles, constructing diversion
14 ditches around such stockpiles and initiating a salt recovery process
15 which would reprocess all accumulated material during the summer. By
16 early August the only thing ARC had done was purchase covering for the
17 stockpiled dross.

18 Feeling the need to formalize their arrangements and agreements
19 for compliance, WDOE issued Regulatory Order DE 83-380 on August 15,
20 1983, calling for protection of a limited amount of covered black
21 dross (1,000 tons) in interim storage and removal of all dross in
22 excess of that amount to the Mica Sanitary Landfill by September 30,
23 1983.

24 VII

25 ARC did not appeal the terms of this order to this Board. Indeed,

26 AMENDED FINAL FINDINGS
27 OF FACT, CONCLUSIONS
OF LAW & ORDER
PCHB No. 85-68

1 shortly after the order was issued, the company suffered a kind of
2 paralysis owing to the severe illness of the vice president with whom
3 DOE had been dealing and who was in charge of the company's day-to-day
4 operations.

5 At the same time economic problems were besetting the company
6 owing to depressed conditions in the aluminum market.

7 VIII

8 In February 1984, WDOE informed ARC it was referring enforcement
9 of DE 83-380 to the Attorney General's Office. By this time a new
10 vice president had been brought in to operate the company. He had to
11 be familiarized with the black dross problem from WDOE's perspective.
12 Discussions, meetings and correspondence culminated in a letter to ARC
13 in June 1984 from the agency's legal counsel, contemplating a new
14 order with new compliance times. The letter further discussed seeking
15 an exemption of the ARC black dross as a dangerous waste.

16 No new order with new compliance times was ever issued. The
17 exemption was apparently never pursued and ruled upon.

18 IX

19 The legislature adopted a provision temporarily banning the
20 off-site disposal of dangerous waste commencing June 7, 1984.
21 Accordingly, WDOE advised ARC to cease disposing of dross at the Mica
22 Landfill thereafter. However, in February, March, April and May of
23 1984, black dross was removed from the pile at the ARC plant and
24 transferred to the Mica Landfill. During this period more dross was
25 hauled off site than was generated. An attempt was made to cover part

1 of the pile remaining.

2 In September 1984, the new vice president resigned and the company
3 ceased operations at the Veradale site altogether. Shortly before he
4 left, this vice president acceded to the urgings of WDOE and applied
5 for a permit as a generator and storer of dangerous waste.

6 X

7 In October and November 1984, WDOE's inspector visited ARC's
8 moribund plant site. This inspection revealed that the dross pile was
9 still largely intact; the covering was only partial and badly torn; no
10 berms or ditches had been constructed. This was communicated to Jack
11 Lyon, the company's president who, by that time, had assumed the
12 active management of the enterprise. Another site inspection occurred
13 early in January 1985. Only a portion of the dross pile was covered.

14 XI

15 Mica Landfill became available again for disposal of dangerous
16 waste in May of 1985. This fact was unknown to ARC until the hearing
17 in this case.

18 XII

19 The black dross pile at ARC's plant is located on the land surface
20 above the Spokane aquifer, a major source of municipal and domestic
21 drinking water. However, no evidence was presented that any salts
22 have in fact leached from ARC's dross pile into the soil or into the
23 ground water. ARC's president asserts that the waste material becomes
24 impervious to weather very shortly after it cools because oxides form
25 a hard covering, coating the soluble materials. WDOE's inspector had

26 AMENDED FINAL FINDINGS
27 OF FACT, CONCLUSIONS
OF LAW & ORDER
PCHB No. 85-68

1 no information about this.

2 We observe that Category D denotes the least toxic of the
3 categories of toxicity under DOE's rules. Further, we note that black
4 dross of similar chemistry from another location has been analyzed by
5 WDOE without any subsequent designation by it as a dangerous waste.

6 XIII

7 On February 6, 1985, WDOE issued a civil penalty, Order Number DE
8 85-135 in the amount of \$10,000. Appellant applied for relief from
9 the penalty immediately. On April 4, 1985, the WDOE denied the
10 application for relief. From this appellant ARC, by its president
11 Jack Lyon, appealed to the Board for relief from the penalty and
12 declassification of black dross as a dangerous waste on May 1, 1985.

13 XIV

14 Any Conclusion of Law which is deemed a Finding of Fact is hereby
15 adopted as such.

16 From these Findings the Board comes to these

17 CONCLUSIONS OF LAW

18 I

19 The Board has jurisdiction over these persons and these matters.
20 Chapters 43.21B, 90.48 and 70.105 RCW.

21 II

22 DOE has asked this Board to find that ARC black dross was properly
23 designated a "dangerous waste." By this request the agency has
24 receded from its position that the validity of the Order, DE 83-380,
25 is not a proper subject for this proceeding.

26 AMENDED FINAL FINDINGS
27 OF FACT, CONCLUSIONS
OF LAW & ORDER
PCHB No. 85-68

1 Absent a contest concerning our authority to look behind the face
2 of the order, we have addressed the waste characterization here and
3 decide that the chemical analysis appropriately leads to the
4 designation made in this case pursuant to WAC 173-301-101.

5 III

6 Under terms of chapter 70.105.095 RCW, penalties may be levied for
7 failure to comply with a dangerous waste management compliance order.
8 ARC did not comply with DE 83-380 and various requests by WDOE.

9 Issuance of Order requiring compliance

- 10 (1) Whenever on the basis of any information the
11 department determines that a person has violated
12 or is about to violate any provision of this
chapter, the department may issue an order
requiring compliance either immediately or
within a specified period of time....
- 13 (2) Any person who fails to take corrective action
14 as specified in a compliance order shall be
15 liable for a civil penalty...In addition the
department may suspend or revoke any permits
and/or certificates issued under the provisions
of this chapter to a person who fails to comply
with an order directed against him.
- 16 (3) Any order shall become final unless, no later
17 than thirty days after the order is served, the
18 person(s) named in the order shall request a
19 public hearing. The department shall promptly
conduct a public hearing to consider testimony
and new information regarding the order. The
department may, at its discretion, either modify
the order or maintain it unchanged....
- 20 (4) Any person directly affected by a compliance
21 order or by any decision of the department
22 regarding a compliance order may appeal the
23 order or decision to the pollution control
24 hearings board in accordance with chapter 43.213
25 RCW. (Emphasis added.) RCW 70.105.095.

26 IV

27 In the instant case, the specified offense is a failure to comply

1 with an order dealing with storing a dangerous waste in a safe
2 manner. Over two years have been spent trying to resolve this problem.

3 However, no harm to ground water resources or to human health and
4 safety have been shown. Further, even the threat of such harm has not
5 been shown to be severe.

6 This company has no prior record of violating the hazardous waste
7 laws and has made significant, if fitful, efforts to comply with
8 WDOE's requirements in the instant case. An influential factor in
9 this regard is the temporary closure of the Mica Landfill to disposal
10 of dangerous waste.

11 Much of the history of this matter can be explained by the
12 management turnovers and financial reverses suffered by the company.
13 While such explanation cannot excuse the failure to comply with a
14 strict liability statute, it can be considered in determining the
15 appropriateness of a particular penalty. The purpose of the civil
16 penalty provisions is not primarily to punish but to secure compliance.

17 Under all the circumstances of this case, including the company's
18 present strained circumstances, we conclude that the objective of
19 changing behavior will be adequately served by reduction of the
20 penalty as set forth below.

21 v

22 The discretionary civil penalty power delegated to the
23 administrative arena by the legislature depends for its legitimacy
24 substantially on the existence of adequate procedural safeguards. See
25 Yakima Clean Air Authority v. Glascam Builders, 85 Wn.2d 255, 534 P.2d

26 AMENDED FINAL FINDINGS
27 OF FACT, CONCLUSIONS
OF LAW & ORDER
PCHB No. 85-68

1 33 (1975). We conclude that the statutory scheme here which gives the
2 agency the power to assess penalties of "not more than ten thousand
3 dollars per day" implicitly grants power to this Board to review the
4 amount of penalty imposed in any instance:

5 Any penalty imposed...shall be subject to review by
6 the pollution control hearings board.... RCW
7 70.105.080.

8 VI

9 Any Finding of Fact which deemed a Conclusion of Law is hereby
10 adopted as such.

11 From these Conclusions of Law the Board enters this
12
13
14
15
16
17
18
19
20
21
22
23
24
25

26 AMENDED FINAL FINDINGS
27 OF FACT, CONCLUSIONS
OF LAW & ORDER
PCHB No. 85-68

1 ORDER

2 Washington State Department of Ecology Order DE 85-135 is
3 affirmed; provided, however, that \$8,000 is vacated and \$2,000 remains
4 due and payable.

5 DONE this 28th day of August, 1985.

6 POLLUTION CONTROL HEARINGS BOARD

7
8 Gayle Bothrock
9 GAYLE BOTHEROCK, Vice Chairman

10 Wick Dufford
11 WICK DUFFORD, Lawyer Member

12 Lawrence J. Faulk 8/28/85
13 LAWRENCE J. FAULK, Chairman
14
15
16
17
18
19
20
21
22
23
24
25

26 AMENDED FINAL FINDINGS
27 OF FACT, CONCLUSIONS
OF LAW & ORDER
PCHB No. 85-68

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
ALUMINUM RECYCLING CORPORATION,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 85-68

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal of an order imposing a \$10,000 civil penalty for failure to complete terms of a 1983 regulatory order, came on for formal hearing before the Pollution Control Hearings Board; Lawrence J. Faulk, Wick Dufford, and Gayle Rothrock (presiding) at Spokane, Washington, on July 30, 1985, and at Lacey, Washington, on August 6, 1985. Ken Wittstock of Spokane and Donna K. Woods of Tacoma officially reported the proceedings. A visit was made of the Veradale, Washington ARC site.

Appellant company was represented by its president, Jack Lyon.

Respondent Washington State Department of Ecology was represented by Charles K. Douthwaite, Assistant Attorney General.

Witnesses were sworn and testified. Exhibits were admitted and examined. Argument was heard. From the testimony, evidence, and contentions of the parties, the Board makes these

FINDINGS OF FACT

I

Aluminum Recycling Corporation (ARC) operated a secondary aluminum smelter which recycled beverage cans and aluminum furnace skimmings into aluminum ingots at a leased site near the rolling mill of Kaiser Aluminum Corporation near Veradale on Sullivan Road. ARC's smelter commenced operation there during mid-1982 and closed down in September, 1984, at least in part due to an economic downturn in domestic aluminum markets, a downturn which persists.

II

In November 1982 the vice president of ARC contacted WDOE's Eastern Regional Office to discuss a plan to reprocess black dross, dark grey-to-black tailings from the smelting process. In December a WDOE official requested that all leachable material, including black dross, be stored in a manner that prevents soluble salts from entering the soil and groundwater. Reports on the typical content of black dross indicate it contains approximately 50 percent salts, including sodium chloride and potassium chloride. Some pure aluminum and aluminum oxides are also in dross.

1 III

2 In February 1983 the same WDOE official, who evaluates and
3 monitors hazardous waste storage and disposal practices of many
4 companies in northeastern Washington, wrote ARC informing them that
5 black dross is a designated dangerous waste--category D toxic
6 waste--under WDOE regulations. Such types of regulation-referenced
7 categorizations are called in the vernacular, "book designation."

8 WDOE regulations are based on concentrations of suspect
9 constituents of by-products or compounds. Percentage and weight
10 figure into the calculations. U. S. Environmental Protection Agency
11 and U. S. Occupational Health and Safety Administration source
12 documents are consulted. Black dross, at category D, is a
13 less-alarming or low-level toxic waste.

14 IV

15 In the course of interacting with regulatory authorities, an ARC
16 corporate official discovered that being in the modern recycling
17 business was not enough to set aside compliance with each of the
18 environmental laws of the state and he filed a "Notification of
19 Dangerous Waste Activities" form with WDOE in December of 1982
20 indicating ARC was a generator, treater, and storer of salty dangerous
21 waste. Numerous discussions followed.

22 V

23 WDOE was apparently under the impression ARC agreed to a program
24 of covering dross stockpiles, constructing diversion ditches around
25 such stockpiles and initiating a salt recovery process which would

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 85-68

1 reprocess all accumulated material during the summer. By early August
2 the only thing ARC did was purchase covering for the stockpiled dross.

3 Feeling the need to formalize their arrangements and agreements
4 for compliance, WDOE issued Regulatory Order DE 83-380 calling for
5 protection of a limited amount of covered black dross (1,000 tons) in
6 interim storage and removal of all dross in excess of that amount to
7 the Mica Sanitary Landfill by September 30, 1983.

8 VI

9 ARC did not appeal the terms of this order to this Board, nor did
10 it comply with the order.

11 The company experienced organizational and economic problems and
12 could not find a course of action to bring its salt recovery process
13 to the worldwide market place, or even its own facility at Veradale.
14 Some black dross was moved to the Mica Sanitary Landfill before it was
15 temporarily closed.

16 VII

17 In February 1984 WDOE informed ARC it was referring enforcement of
18 DE 83-380 to the Attorney General's Office. Meetings occurred in June
19 1984 to discuss yet another schedule for the protection of the large
20 volume of dross stored at the ARC facility. In July samples were
21 taken for WDOE fish bioassay tests of apparently "aged black dross."
22 There were no mortalities. In August samples were taken of apparently
23 "fresh black dross." At 1,000 ppm in water there was 100 percent
24 mortalities.

VIII

Some additional dross was removed to the Mica Landfill in February, March, and April 1984, and some dross was covered. Weather conditions were fairly brutal to the covering. Good covering was to be installed by October 1, 1984. The company ceased operations at the site in September 1984.

Site inspections in October and November 1984 revealed non-compliance with the June 1984 agreements. This was communicated to the company president. Another site inspection occurred early in January 1985. Only a portion of the dross pile was covered.

IX

Thereafter, on February 6, 1985, WDOE issued a civil penalty, Order Number DE 85-135 in the amount of \$10,000. Appellant applied for relief from the penalty immediately. On April 4, 1985, the WDOE denied the application for relief. From this appellant ARC, by its president Jack Lyon, appealed to the Board for relief from the penalty and declassification of black dross as a dangerous waste on May 1, 1985.

X

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and these matters.

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER
PCHB No. 85-68

1 Chapters 43.21B, 90.48 and 70.105 RCW.

2 II

3 The appealed civil penalty DE 85-135 is lawfully at issue in this
4 matter. Order DE 83-380 is not. The statute of limitations has run
5 its course on that order.

6 Under terms of chapter 70.105.080 and .095, penalties may be
7 levied for failure to comply with dangerous waste management laws and
8 regulations. ARC did not comply with DE 83-380 and various requests
9 by WDOE.

10 (1) Every person who fails to comply with any
11 provision of this chapter or of the rules
12 adopted thereunder shall be subjected to a
13 penalty of not more than ten thousand dollars
14 per day for every violation. Each and every
15 such violation shall be a separate and distinct
16 offense. In cases of continuing violation,
17 every day's continuance shall be a separate and
18 distinct violation. Every person who through an
19 act of commission or omission, procures, aids,
20 or abets in the violation shall be considered to
21 have violated the provisions of this section and
22 shall be subject to the penalty herein
23 provided....

24 (3) Any penalty imposed by this section shall become
25 due and payable thirty days after receipt of a
26 notice of imposing the same....Any penalty
27 resulting from a decision of the hearings board
shall become due and payable thirty days after
receipt of the notice setting forth the decision.
RCW 70.105.080

Issuance of Order requiring compliance

- 22 (1) Whenever on the basis of any information the
23 department determines that a person has violated
24 or is about to violate any provision of this
25 chapter, the department may issue an order
26 requiring compliance either immediately or
27 within a specified period of time....
- (2) Any person who fails to take corrective action
as specified in a compliance order shall be

(3) Any order shall become final unless, no later than thirty days after the order is served, the person(s) named in the order shall request a public hearing. The department shall promptly conduct a public hearing to consider testimony and new information regarding the order. The department may, at its discretion, either modify the order or maintain it unchanged....

III

IV

From these Conclusions of Law the Board enters this

7

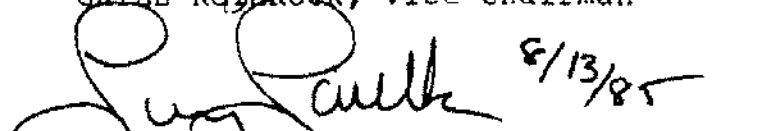
ORDER

Washington State Department of Ecology Order DE 85-135 is affirmed; provided, however, that \$8,000 is vacated and \$2,000 remains due and payable.

DONE this 17th day of August, 1985.

POLLUTION CONTROL HEARINGS BOARD


GAYLE ROTHROCK, Vice Chairman

 8/13/85
LAWRENCE J. FAULK, Chairman

(Not available for signature)
WICK DUFFORD, Lawyer Member